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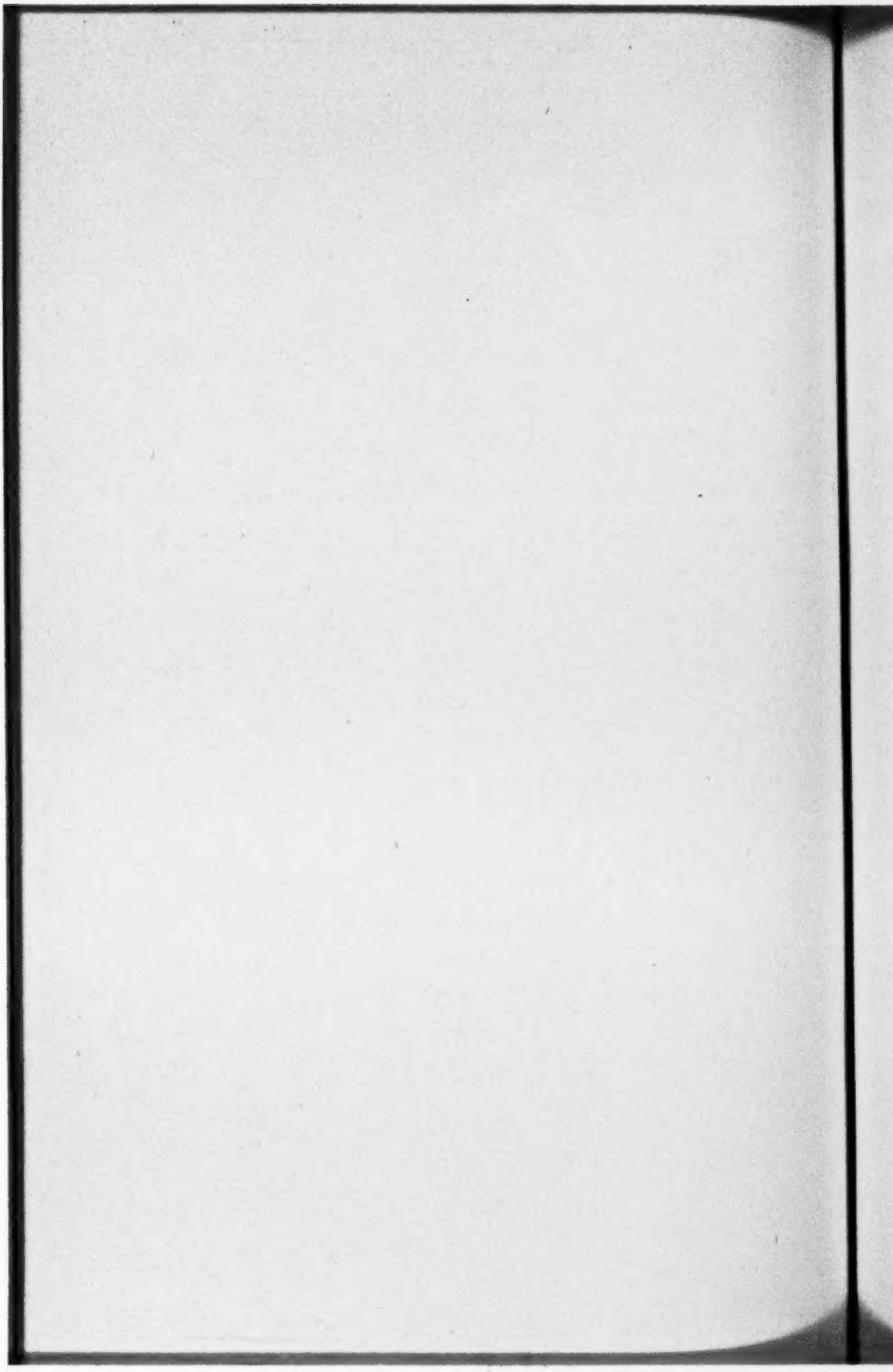


IN THE

Supreme Court of the United States

October Term, 1942.

No. 394

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

EXPRESS PUBLISHING COMPANY,
Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

1. Whether the judgment, supported by sufficient evidence, that the Respondents were bargaining in good faith and were not in contempt is subject to review by this Court.

2. Whether a judgment refusing criminal punishment for contempt is subject to review by this Court.

3. Whether the Guild, since it did not represent the majority of the employees, was entitled to bargain collectively for all the employees.

STATEMENT.

Upon the entry of the original decree in the Circuit Court of Appeals the Respondent notified the Guild of its willingness to bargain with it as the exclusive representative of the employees. The Guild did not accept the offer then. Upon entry of the second decree of the Court in accordance with the judgment of the Supreme Court, the Respondent promptly posted the notices provided for and again notified the Guild of its willingness to bargain.

The Guild submitted a proposed contract to Respondents and at a meeting asked that Respondents agree upon the holding of meetings at night. Respondents objected to that hour because that is the rush hour in the publication of its newspapers and suggested afternoon meetings. Upon the Guild's claiming both at the meeting and in circulars that more employees could attend night meetings and that they wanted all to be present and accusing Respondent of avoiding that by afternoon meetings, Respondent offered to excuse all employees from work to attend the afternoon meetings.

The Guild then submitted a proposed contract which was onerous in its terms requiring a closed shop to the extent of 9/10ths of the editorial department, fixed increases in pay depending upon longevity of service rather than on ability and efficiency, for a monopoly of employment to the persons who happened to be employed at the present time, for dismissal pay at such high rates that if Respondent quit business it would amount to more than Repondent's net worth, and other onerous terms. After a full discussion of this contract Respondent suggested that it would make a counter proposition. The Guild asked it not to do so, saying it would withdraw the proposal and submit another one. It did so and the second contract was more onerous in every particular than the first one. It provided for a completely closed shop, that new employees must be nominated by the Guild, a substantial raise in salaries over the first proposal, with the additional provision that all salaries not increased by the minimum scale should receive a flat increase, an increase in severance pay over that provided for in the first contract of approximately 50%, a provision that "there shall be no pay cuts," increase in holiday provisions, provision that any employee joining the armed forces of the United States should be re-employed upon his return without any limitation whatsoever as to time or ability to serve, and a provision that such employees should continue to receive their full salary during the period of service less any salary paid by

the Government, provision for assistance in the collection of Union dues, and a provision for six months maternity leave at full pay. The Guild made no further proposals. The Express made a proposal along the lines referred to by the Circuit Court of Appeals in its original opinion, for the continuance of employment terms as they were subject to the rights of either party to terminate at any time, the contract, however, to be a collective contract instead of individual contracts. The Guild refused that.

A reading of the record will indicate that the quotations contained in the statement in the application for writ of error are brief phrases lifted from complete sentences and do not give a fair reflection of the negotiations referred to. The opinion of the Circuit Court of Appeals will be found at pages 300-304 of the Record.

FIRST POINT.

The judgment should not be reviewed by this Court because it was based on a finding of fact that the Respondents were bargaining in good faith and that finding was supported by sufficient evidence.

ARGUMENT.

The case before the Circuit Court of Appeals turned on one of fact, whether the Respondents were bargaining in good faith. We do not agree with the Petitioner's contention that the facts are undisputed. There was a stenographic report of the meetings

and copies of circulars issued by the Guild and affidavits of both the Petitioner and the Respondents all in evidence. The facts were found by the Circuit Court of Appeals from that evidence. It was for that Court to determine from the actions and words of the parties as reflected by the record and from the evidence filed before it the conclusions of fact as to the intentions and good faith of the parties. It had evidence before it that the Guild had submitted a contract containing provisions that Respondents were very much opposed to; that it then immediately withdrew that proposal and submitted a second proposal increasing its demands in every particular far above those in the original proposal. There were just two conclusions to come to about that: Either that the Guild had changed its mind and wanted to demand more even though it already knew that Respondent was opposed to granting the first proposal; or, that the Guild was acting in bad faith and wanted to present a proposal that it was sure would not be accepted voluntarily. It could consider the evidence that at the very outset the Guild demanded that all employees be present and when Respondents acceded to their request of closing down the work so that all employees could attend the meeting, the Guild filed a complaint before the Labor Board claiming the employees had by this action, taken at the Guild's own request, been coerced to attend the negotiations, and also made numerous other complaints before the Board in an effort to

coerce the Respondent into agreeing to terms that it did not voluntarily believe were best for itself or for the employees. (R. 273-7). The evidence shows that throughout the negotiations the employer conducted the negotiations in a dignified manner seeking to reason with the Guild negotiators, while the Guild negotiators adopted just the opposite manner, indulging in threats, ridicule and undignified conduct. The Court could consider the fact that while the Guild was insisting upon the employer binding itself for a considerable length of time, it uniformly insisted that the employees, either individually or collectively, should have the right to quit any day they pleased. (R. 182). The employer was simply proposing that the right of termination be mutual instead of merely the employees' privilege. In response to the Guild's charges of bad faith against the employer because it did not agree to any increase in wages, it could consider the statements made by it in the negotiations that it was already paying the highest average wages of any concern of substantial size in the City and the reply of the Guild negotiator (Record page 251): "I dare say that it is probably true in Texas as it is true in many other States that the average hourly rate of the printing and publishing industry is frequently the highest rate of any industry in the State," but stating that that was irrelevant and nobody would be impressed with that argument. It could consider the claims the Express made, the denial on the part of the Guild in the

negotiations, that it was paying more wages now than in 1929 at the height of the boom, but had less advertising, and that it was now paying the peak of all wages it had ever paid. (Record pages 132-3, page 215). All the occurrences from which conflicting deductions might have been drawn are too numerous to describe here. While the words used by the parties and their actions on each occasion were not in dispute, the conclusions to be drawn from those words and actions were the questions of fact in dispute. The Court below considered the record and stated that

> "The only question presented for decision is whether the Company endeavored to bargain in good faith * * * in conformity to the judgment. In deciding that question we are entitled to draw our own conclusion from the facts in the record."

The Court discussed the facts and concluded that the Respondents were bargaining in good faith, and that the allegations of contempt were not sustained by the proof. Thus it found the disputed issue of fact in favor of the Respondents. That issue of fact was all that was decided. Being supported by sufficient evidence it should not be reviewed here.

The Petitioner criticizes the Court's reference to the demand for a closed shop and assistance in collecting Union dues and participation by the Guild in choosing employees, saying they were not required by law. That reference of the Court must be

read in connection with the position taken by the Petitioner before the Court below. There the Petitioner contended that the Respondent was in bad faith as a **matter of law** because it did not agree to any of those provisions in the contract, and the Court was merely pointing out that the employer, while it was obligated to bargain collectively in good faith, was not obligated by law to agree to those terms and that the Guild when it first demanded a partially closed shop and part of the other provisions and then raised the proposal to a completely closed shop, etc., was not trying to be reasonable.

Petitioner is now taking the position before this Court that **as a matter of law** it constitutes bad faith for an employer in negotiating to offer a contract that is subject to termination by either party at will. The Guild insisted that it reserve the right to every individual employee and all of them collectively to quit the employment or strike at any time. They had a right to bargain for those terms; but it is not as a matter of law bad faith for the employer to bargain for similar terms.

The employer is criticized for objecting to a closed shop. The record shows that the mechanical departments have always had closed shops in Respondent's business, agreed to willingly by the employer, but that the employer objected to agreeing to a closed shop with the Guild giving the Guild the right to nominate for employment all workers and discharge all editors who will not join the Guild,

because it was unwilling to surrender its power to employ and discharge or choose its editors to carry out the publisher's editorial and news policies. A publisher cannot write an entire newspaper himself; he must depend upon his editorial and news policies being carried out by the editorial employees. A contract exempting employees from discharge and pay cuts to a large extent would free the employees from the publisher's control of his editorial and news policies and leave the employees in a position to dedicate the newspaper to those editorial and news policies advocated by the Union rather than those advocated by the publisher. The employees then would be free to voice the Union's policies on war or peace, taxation, public expenditures, candidates for office, etc., on most of which that Union's opinions and this newspaper's opinions have differed. It is noteworthy that when the framers of the Constitution desired to make the courts entirely free of the executive they denied to the executive the power to remove the judiciary or reduce the compensation. And Alexander Hamilton, Federalist No. 78 and 79, reasons that these measures most effectively free the judiciary from executive control. The Union adopted exactly the same measures to free the editorial employees from the publisher's control of the opinions to be expressed in their writings. The Union was entitled to bargain for the control of this newspaper. It is a valuable stake to bargain for. It is the principal newspaper in the south half of the

largest State in the Union. If won it could be used to voice the Union's policies upon the great public issues of the day and attack on their own home ground those outstanding leaders in Congress from Texas who do not always go along with the Union on either foreign or domestic policies. Of course the Union could bargain for it. But the publisher was also entitled to bargain for the retention of the control of that editorial policy by proposing that he retain the right to dismiss employees and raise or reduce their compensation—the other parties to have the corresponding right to terminate the contract.

It is contended that it was bad faith **as a matter of law** for the employer to bargain for a difference in the terms of employment for professional employees, such as the editorial writers and employees in the mechanical departments. The employer urged that rigid seniority scales and rules for compensation, employment, etc., should not be applied to professional services and that each party should reserve freedom of termination at pleasure. It should not be held that it was bad faith as a matter of law for the Respondent to offer a form of contract which the great majority of men have freely chosen as the most acceptable form in which to couch their relationships. The great mass of the people in the United States are employed under oral or written agreements where either may terminate the relationship at pleasure, and may demand a variation in the terms at pleasure and terminate the relationship if the other does not accept. That situation applies

not only as to employer and employee, but as to the great mass of other contractual relationships. Telephone, gas and other public services are commonly purchased under such contracts. Customers of banks, department stores and manufacturing establishments are upon the same basis. Partnership contracts are generally subject to termination by any partner at will. Who ever heard of lawyers contracting to be partners except subject to termination by any at pleasure? The same generally applies to doctor-patient and lawyer-client contracts. The negotiators for the Express pointed out that everyone of themselves was employed by the Express under a contract terminable at will by either party and had been so employed for a long period of years, and that they would refuse any other type of employment for themselves, deeming a terminable contract to promote better relationship, especially in professional work, and in the long run greater security; for neither party would be likely to want to terminate at the first lawful opportunity a contract which would not act as a shackle. The Guild had a right to propose a contract which would bind the employer, reserving to their members, collectively and individually, the right to quit at any time, but it was not improper for the Express to request that it have also the same privilege of terminating the contract.

The facts have been tried by the Court below and it has found as a fact that the proposals made by

the employer were made by it in good faith. It should not be held here as a matter of law that the offer of the employer was in bad faith.

SECOND POINT.

The judgment should not be reviewed in this Court because it was one refusing to punish the parties for criminal contempt and not one refusing to enforce the original decree.

ARGUMENT.

What the Court did here was to refuse to punish the employer and its officers for alleged contempt of Court, finding that they had acted in good faith and were not in contempt. It did not purport to relieve the parties of their continuing obligation to bargain under the Wagner Act and the Court's former decree. On the contrary, it expressly pointed out the decision in the Belo case for further guidance of the parties in future bargaining. The judgment of the Court below, therefore, fell within the class designated as judgments concerning criminal contempt which are not reviewable by an appellate court.

The distinction is set out in **Wingert v. Kiefer,** 29 Fed. (2d) 59. There the trial court in a civil case had enjoined the sale of some pledged shares of stock. The sale was made despite the order. The trial court upon motion to punish the parties for contempt heard the motion and dismissed the charge

of contempt. The Circuit Court of Appeals held that it was clear that the parties had disobeyed the trial court's order, but that the question adjudicated by the court was whether it would punish the parties for contempt and that such a proceeding was in "criminal contempt" and an order exonerating the respondents cannot be reviewed by an appellate court.

Here likewise the question adjudicated by the Circuit Court of Appeals was whether the actions thus far taken by the Respondents merited punishment for contempt. The Court found that the actions were taken in good faith and did not merit such punishment. It indicated clearly, however, that the parties were not relieved from obligations to bargain, stating further rules for limitations upon their rights in such bargaining by referring to the Belo case, another newspaper case decided recently by the Supreme Court.

THIRD POINT.

It being undisputed that the Guild never represented a majority of the employees, it was not entitled to bargain collectively for the employees.

ARGUMENT.

Throughout the proceedings in the original case the negotiators for the Guild (not employees of the Express) stated that the Guild represented a ma-

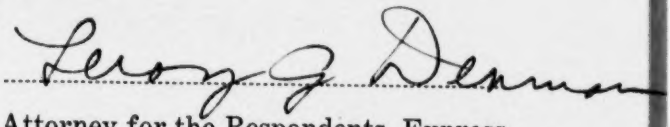
jority of the employees. Their statement was believed without question by the employer throughout all of those proceedings. At the commencement of the negotiations following the decree in the original case, the negotiators (again not employees of the Express) again stated that the Guild represented the majority of the employees. After the negotiations had terminated, however, and before the hearing of this contempt proceeding, it was disclosed by the Guild that it did not and does not represent a majority of the employees. (Record page 299). That was shown by the sworn affidavits filed by Respondent and was not denied by the Petitioner, Petitioner simply contending that such showing came too late.

It would be a mockery of justice to require negotiation with persons now conceded never to have represented a majority of the employees. It would permit the minority to control the majority, the very opposite of what was contemplated by the Wagner Act. Those employees were never parties to any of these proceedings and should not be bound by the acts of representatives not of their own choosing.

CONCLUSION.

The questions before the Circuit Court of Appeals and presented by Petitioner being purely questions of fact decided by that Court upon sufficient evidence, we respectfully submit the Writ should be denied. Furthermore, if this Court should decide

that a review of the facts is within its purview, then we respectfully submit that the Circuit Court of Appeals' findings upon the facts were correct and the Writ should be denied.



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